IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

State of Delaware,	:	Cr.A. No. 06-03-2533
	:	Case No. 0410015738
vs.	:	
	:	
Raeshaun D. Godwin,	:	
	:	
Defendant.	:	

Date of Hearing: July 24, 2006

Decided: July 26, 2006

Upon Defendant's Motion to Dismiss and Motion to Suppress

Defendant's Motion to Dismiss and Motion to Suppress are denied.

Dennis Kelleher, Esquire, Department of Justice, 102 West Water Street, Dover, Delaware 19901, attorney for the State.

Jeffrey S. Welch, Esquire, Welch & Associates, Post Office Box 25307, Wilmington, Delaware 19899, attorney for Defendant.

Trader, J.

In this criminal appeal from the Justice of the Peace Court, I determine that the defendant's motion to dismiss on the grounds of delayed discovery by the State is without merit because the State has furnished all of the necessary discovery to the defendant in this Court well in advance of trial. I further determine that the defendant's motion to suppress must be denied because the police officer had a reasonable and articulable suspicion to stop the defendant's vehicle for improper right turn in violation of 21 Del.C. Sec. 4152 or careless driving or inattentive driving in violation of 21 Del.C. Sec. 4176. I also conclude that based on the totality of the circumstances there was a fair probability that the defendant committed the offense of driving under the influence. Therefore, the arrest of the defendant for driving under the influence was fully supported by the evidence.

The relevant facts are as follows: On October 10, 2004, the defendant was driving his vehicle westbound on Delaware Route 8 approaching Kenton Road. At the same time and place, Patrolman Turner was immediately behind the defendant and observed the defendant's vehicle swerve and almost hit a curve. When the defendant turned right onto the Kenton Road, he crossed the center line. Patrolman Turner activated his emergency lights and the defendant did not immediately stop his vehicle in response to the visual signal of the police officer. When Patrolman Turner approached the vehicle, he smelled a strong odor of alcoholic beverage on the defendant's breath and the defendant admitted he had two beers to drink. He then requested the defendant to perform certain field sobriety tests. The defendant passed the ABC test, the counting test, and the finger-to-nose test, but he failed the other field sobriety tests. The police officer observed six clues on the HGN test and the defendant could not perform the one-leg

stand test. On the heel-to-toe test the defendant missed heel-to-toe on several steps and he stepped off the line one time. The defendant also failed the PBT test and the officer noted that the defendant had bloodshot and glassy eyes. At the conclusion of all of the tests, the defendant was arrested for driving under the influence.

In the court below, considerable controversy arose between the State and the defendant over the existence of a video tape of the defendant. The defendant had requested discovery of the tape prior to trial. At the scheduled trial date on August 26, 2005, Officer Turner was unable to locate the video tape at Troop 3. The arresting officer believed that the tape had been erased over by subsequent taping. The police officer finally located the video tape on December 16, 2005 and Ms Schmidhauser, the deputy attorney general prosecuting the case in the court below, indicated that the tape was not discovered earlier because the video tape was filed under a different complaint number. The delay in the furnishing of the video tape in the court below is the stated grounds for defendant's motion to dismiss. The defendant was convicted of driving under the influence in the court below and has taken an appeal to this Court requesting a trial *de novo*.

Under Rule 16(a)(1), the State has an obligation to provide the defendant with pretrial discovery including any relevant written or recorded statements made by the defendant. Additionally, the State has a continuing obligation to disclose discoverable evidence. *Kornegay v. State*, 596 A.2d 481 (Del. 1991). In the case before me, the defendant has had possession of the video tape for about six months prior to the trial date in this Court. Although the State was lackadaisical in furnishing discovery in the court below, the trial in this Court is a trial *de novo* and there are no allegations that the State

had been negligent in furnishing discovery in this Court. Accordingly, the State's delayed response in the Justice of the Peace Court does not in any way preclude the defendant from receiving a fair trial in this Court. Furthermore, this Court does not sit as the reviewing court in this case on the rulings made by the Justice of the Peace. Since this case begins anew in this Court it is tried anew here.

Assuming arguendo that I should consider the State's delayed discovery response in the court below, I do not conclude that the motion to dismiss should be granted or that evidence should be excluded from trial. The State in good faith believed that the video tape was erased over and did not exist. The video tape was apparently inadvertently misfiled, and when the officer discovered that the tape existed, a copy of it was immediately furnished to the defendant. Thus, the defendant was able to inspect and view it prior to trial in the Justice of the Peace Court.

Common Pleas Criminal Rule 16 sets forth four alternative sanctions: (1) order prompt compliance with the discovery rules; (2) grant a continuance; (3) prohibit the party from introducing into evidence material not disclosed; or (4) such other order as the Court deems just under the circumstances. *Ray v. State*, 587 A.2d 439, 441 (Del. 1991). After weighing the facts and circumstances, the appropriate sanction for a discovery violation is addressed to the sound discretion of the trial judge. *Doran v. State*, 606 A.2d 743 (Del. 1992). Although there was a lengthy delay in the court below in furnishing the tape, I conclude that the mistake made by the State was made in good faith and that the defendant was not prejudiced by the State's conduct. Accordingly, the motion to dismiss is denied.

The defendant next contends that the police officer did not have reasonable and articulable suspicion to stop his motor vehicle. Under *Delaware v. Prouse*, 440 U.S., 648 (U.S. 1979), prior to stopping a motor vehicle, the police officer must have a reasonable and articulable suspicion that the person has committed a crime. Reasonable suspicion means that the "officer must be able to point to specific and articulable facts which taken together with rational inferences from those facts, reasonably warrants the intrusion." *Terry v. Ohio*, 392 U.S. 1, 21 (1968).

In the case before me, the defendant's vehicle almost hit the curb while proceeding westbound on Delaware Route 8. He also drove over the center line while making a turn onto the Kenton Road. He did not immediately stop his vehicle in response to a visual signal by the police officer. The defendant clearly was in violation of 21 Del.C. Sec. 4176, in that his driving constituted careless or inattentive driving. The defendant also executed a right turn in violation of 21 Del.C. Sec. 4152. Section 4152 requires that a driver execute a right turn as close as practicable to the right-hand curb or edge of the roadway. I conclude the officer correctly assessed the situation and it was reasonable to stop the vehicle under these circumstances.

This case is distinguishable from *State v. Blank*, 2001 Del.Super. LEXIS 223 (Del. Super. June 26, 2001) where the Superior Court in interpreting 21 Del.C. Sec. 4122 held that changing lanes and crossing lane markings are only prohibited when the driver has neglected to ascertain such movement can be made with safety. Section 4152 simply prohibits making a right-hand turn without staying as close as practicable to the right-hand side of the roadway.

The defendant contends that the police officer did not have probable cause to believe that the defendant was driving under the influence of alcohol. I disagree.

A police officer has probable cause to believe a defendant has violated 21 Del. C. 4177 "when the officer possesses information which would warrant a reasonable man in believing that such a crime had been committed." *Clendaniel v. Voshell*, 562 A.2d 1167, 1170 (Del. 1989). As stated in *State v. Maxwell*, 624 A.2d 926, 930 (Del. 1993), "[t]o establish probable cause, the police are only required to present facts which suggest, when those facts are viewed under the totality of the circumstances, that there is a fair probability that the defendant has committed a crime. The possibility that there may be a hypothetically innocent explanation for each of the several facts revealed during the course of investigation does not preclude a determination that probable cause exists for arrest." *Id. (citations omitted)*. Probable cause lies somewhere between suspicion and sufficient evidence to convict. *Hovington v. State*, 616 A.2d 829, 833 (Del. 1992). Additionally, it is only probability and not a *prima facie* showing of criminal activity that is the standard of probable cause. *Illinois v. Gates*, 462 U.S. 213 (1983).

The evidence developed at the suppression hearing shows that the defendant passed the ABC test, the counting test, and the State concedes that he passed the finger-to-nose test. On the other hand, he failed the PBT test, the HGN test, the one-leg stand test, the walk and turn test, and the finger dexterity test. The police officer observed six clues on the HGN test and the defendant could not hold his leg up more than six seconds on the one-leg stand test. On the heel-to-toe test, the defendant missed heel-to-toe on several steps and he stepped off the line once. The defendant contends that he sprained his ankle playing basketball and he was unable to perform the heel to toe test or the one-

leg stand test. The defendant, however, did not seek any medical attention for his sprained ankle and there was no reason that he could not perform the one-leg stand on his good leg. Additionally, the evidence supports the conclusion that he told the police officer that he was injured when he was interviewed at the police station, which was after the completion of the field sobriety tests.

On the issue of credibility, I accept the testimony of the police officer. In comparing the testimony of the police officer with that of the defendant, I note that the police officer is a trained observer, but the defendant's memory may have been affected by the consumption of alcohol. Additionally, the defendant's prior felony conviction impairs his credibility. In making this credibility determination, I reject the testimony of the defendant and accept the testimony of the State's witness.

Applying the law to the facts of this case, I find that there was probable cause to arrest the defendant for driving under the influence. Mixed results in field sobriety tests do not extinguish probable cause if sufficient other factors are present. *Perrera v. State*, 2004 Del. LEXIS 255 at *4 (Del. June 25, 2004). The defendant cites *State v. Hunter*, 2006 Del. C.P. LEXIS 36 (June 9, 2006) to support his contention that there is a lack of probable cause in this case. In the case before me, the defendant failed most of the field sobriety tests, whereas in *Hunter supra*, the defendant passed five of the six field sobriety tests. In addition to the defendant's failure of five field sobriety tests, there was a strong odor of alcoholic beverage on the defendant's breath, the defendant had bloodshot eyes, evidence of erratic driving, and the defendant admitted that he had been drinking. Under all of the circumstances, there is a fair probability that he committed the offense of driving under the influence.

Based on these findings of fact and conclusions of law, the defendant's motion to dismiss and motion to suppress are denied.

IT IS SO ORDERED.

Merrill C. Trader
Judge